Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1979**

No. 79-588

IN THE MATTER OF UNITED CASKET CO., INC.,
*Bankrupt.*

YORK-HOOVER CORP. AND ELGIN METAL CASKET CO., INC.,
*Petitioners,*

*v.*

UNITED CASKET CO., INC.,
*Respondent,*

*and*

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a Writ of Certiorari be issued to review the order of the United States Court of Appeals for the Second Circuit entered in the above entitled case on July 16, 1978.

### Opinions Below

The opinion of the Bankruptcy Court, which is not reported, is reprinted in the Appendix (App. pp. 3a-9a). The opinion of the District Court, which is reported, in 449

F. Supp. 261, is reprinted in the Appendix (App. pp. 10a-17a). The opinion of the New York State Court of Appeals, 47 N.Y. 2d 758 (1979), is reprinted in the Appendix (App. pp. 18a-20a). The opinion of the United States Court of Appeals, not yet officially reported, is reprinted in the Appendix (App. p. 22a).

## Jurisdiction

The United States Court of Appeals for the Second Circuit affirmed an Order of the United States District Court for the Eastern District of New York, which affirmed a decision of the Bankruptcy Court which set priorities for payment between New York State tax liens and the lien claim of security interest creditors, the latter claims being in the sum of $327,500.02. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

## Questions Presented

1. Whether the United States Court of Appeals correctly held as a matter of law that Section 1141, subd. (b) of the New York State Tax Law is an authorization, as distinguished from a mandate or direction, for the Sheriff to proceed upon a docketed tax warrant in the same manner as executions issued against the property of a judgment debtor, and refers only to enforcement, as distinguished from perfection of the lien.

2. Whether the dictum in the decision of the New York State Court of Appeals, in the case of *Marine Midland-Central* v. *Gleason, et al.*, 47 N.Y. 2d 758 (1979), memorandum opinion dated May 1, 1979, is controlling and binding. In such case, wherein the Court affirmed the Order of the Appellate Division, 4th Dept., State of New York, it took the occasion to clarify the procedural steps to convert a State tax warrant into a perfected lien upon the property of a delinquent taxpayer under the Tax Law



(Section 1141, subd. (b)), which provides that upon the docketing of a tax warrant with the County Clerk, "the amount of such warrant so docketed shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant is issued". The Court held that this grants the State a perfected lien upon the filing of a tax warrant without the further necessity of a levy, and in so holding, rejected the conclusion reached by the Appellate Division, 4th Dept., New York, 62 App. Div. 2d 429, that State tax liens, although perfected upon docketing, may be extinguished if a levy is not made within the lifetime of a judgment execution, CPLR of the State of New York, Section 5230, subd. (c).

3. Whether the above dictum of the New York Court of Appeals is contrary to the stare decisis of the State of New York.

4. Whether a tax warrant must be issued to be executed.

5. Whether the equities and the Constitution of the United States warrant proper notice of the lien against personal property, other than by the mere entry of judgment, as a judgment without further action does not automatically, except under Section 1141, subd. (b) of the New York State Tax Law, result in a lien against personal property. The equities are as follows:

(a) The construction of this section disrupts and seriously affects industry, commerce and trade, since, by reason of the lien resulting from Section 1141, subd. (b), without levy or further action or notice, it will now become necessary for all vendors to search the judgment records for a period of twenty years, to determine whether there are, on record, any liens against personal property, resulting from the mere filing of a tax warrant.

(b) Section 1141, subd. (b), requires no notice to the taxpayer of the existence of the lien, as in the

instant case, the taxpayer, United Casket Co., Inc., by its President, represented in writing that there were no judgments or liens against the taxpayer's property.

(c) Customer deposits on account of the purchase of merchandise, may similarly be lost if the State proceeds on this lien under the statute. Must customers or consumers search the records to determine that there are no liens outstanding against the personal property of the taxpayer?

(d) Federal tax liens and security interests can be found by a simple, inexpensive security interest search, without the necessity of an expensive judgment search covering a period of twenty years.

6. Whether the stipulation of settlement between the State of New York Tax Commission and the taxpayer did not result in a waiver of the State's right to proceed under the tax warrant, unless the State, under Section 1141, subd. (b), filed a new tax warrant.

## Statutory Provisions Involved

Section 1141, subd. (b), of the New York State Tax Law is set forth in the Appendix (App. p. 1a).

CPLR, New York, Section 5230, subd. (c), is set forth in the Appendix (App. p. 2a).

## Statement of the Case

(References to "Index" pages, identified by "I", are to the Index on Appeal to the United States Court of Appeals.)

(References to "Deferred Appendix", identified by "DA", are to the Deferred Appendix filed with the United States Court of Appeals.)

(References to Appendix, identified by "App.", is to that attached hereto.)



On April 8, 1976, the New York State Tax Commission filed three (3) tax warrants against United Casket Co., Inc. ("United"), then active in its conduct of business.

On May 3, 1976, United was indebted to York-Hoover Corp. and Elgin Metal Casket Co., Inc. (collectively "York-Elgin"), the petitioners herein, for the sum of $201,736.37 (I. pp. 22-3). York-Elgin made a search of financing statements filed, arranged for the satisfaction of the sole security interest on record and then entered into a security agreement wherein United represented in writing that there were no liens, encumbrances or security interests in and to any of its property or assets, including inventory, furniture, fixtures, accounts receivable and contract rights (I. p. 17).

On April 9, 1976, the day following the filing of the tax warrants, the State Tax Commission, without any notice of such filing to the taxpayer, or anyone else other than by the entry of the judgment, then entered into a stipulation in writing with the taxpayer, United, providing for payment by it of New York State taxes owing in the sum of $88,653.23, at the rate of $2,300 weekly, commencing with April 16, 1976 (I. p. 21). This would have taken over 38 weeks for payment.

On May 12, 1976, York-Elgin filed their financing statements, and thereafter extended further credit and advances to United, so that as of September 24, 1976, the debt of United to York-Elgin, as covered by the security interest, was in the sum of $327,500 (I. pp. 22-3). At that time, United still owed to the State Tax Commission a balance of $49,144.50.

As found by the Bankruptcy Judge, from the time of the filing of its tax warrants on April 8, 1976, until the petition for an arrangement filed by United on September 24, 1976, and thereafter, no levy had been made by the State Tax Commission on its tax warrants or judgment,

and no personal property of United had been taken into possession by the State Tax Commission.

During the pendency of the Chapter XI proceeding, York-Elgin started their adversary action to vacate the automatic stay provisions in the Order entered in the proceeding, and for a declaratory judgment that the security interest of York-Elgin was superior to the tax liens asserted by the State and by Internal Revenue Service. Internal Revenue Service conceded on the record that its Federal tax lien was subordinate to the security interest asserted by the State. The various decisions by the Bankruptcy Court, the District Court and the Court of Appeals, 2nd Circuit, all found the State Tax Commission to have priority over York-Elgin on the basis of *Matter of Thriftway Auto Rental Corp.*, 457 F. 2d 409, but all determined that administration expenses and wage claims were to be paid out of the share of the New York State Tax Commission. The latter part of such decision is not being appealed by the State Tax Commission.

The Bankruptcy Court in the within matter had held that the tax liens of the Department of Taxation and Finance of the State of New York were prior in right and superior to plaintiffs' security interest, based on the interpretation of the Court of Appeals, 2nd Circuit, in the *Matter of Thriftway,* of Section 1141, subd. (b), of the New York State Tax Law. It held that the filing of the tax warrant as a judgment created a lien, notwithstanding the fact that the State took no steps to seize the taxpayer's property, or otherwise enforce the lien, and further held, based on *Matter of Thritfway,* that the filing of the tax warrant as a judgment creating the lien, served to give notice of the lien and constructively operated as an execution. It should be noted that the U.S. Court of Appeals, in the *Matter of Thriftway,* had reservations concerning its determination, because it added.

> "Doubtless, we shall soo be instructed if we are wrong."



The District Court affirmed the Order of the Bankruptcy Court, although Chief Judge Mishler, of the Eastern District Court, New York, in rejecting York-Elgin's interpretation of the statute, did state:

> "We cannot view the pertinent provision of the Tax Law with the same myopic simplicity the State does. York-Elgin's suggested construction of § 1141(b) is at the very least persuasive. The statute, when considered in its entirety, can be logically read to grant the State, upon the docketing of tax warrants, a choate lien on the taxpayer's real property and an inchoate lien subject to perfection by levy on his personalty. Such a construction is entirely consistent with the requirements of CPLR Article 52 and the direction in § 1141 (b) requiring the sheriff, after docketing, to proceed upon the warrant 'in the same manner and with like effect' as under executions against property issued upon judgments. Moreover, such an interpretation lends meaning to the last sentence of the subdivision which permits the State to issue new warrants should the original be returned unsatisfied. *Accord; United States* v. *Weather Service, Inc.,* 74-2 U.S. Tax. Cas. 9724 (E.D.N.Y. 1974) (docketing of warrants in absence of levy does not give State 'perfected' Lien); *In Re Estate of Robbins,* 74 Misc. 2d 793, 346 N.Y.S. 2d 86 (Sur. Ct. 1973) (lien attaches to personalty only upon service of execution levies, not upon docketing); *Lacaille* v. *Feldman,* 44 Misc. 2d 370, 253 N.Y.S. 2d 937 (Sup. Ct. 1964) (filing of warrant gives State equal parity with creditor who has docketed judgment; State obtains choate lien on real property and inchoate lien a personalty until levy)." (App. p. 10a).

The United States Court of Appeals, at the time of the argument, was informed that in a New York case, *Marine Midland Bank-Central* v. *Gleason, et al.,* the Appellate Division, 4th Dept. had held that State tax liens, although

perfected upon docketing, may be extinguished if a levy is not made within the lifetime of a judgment execution under CPLR Section 5230, subd. (c), of the State of New York. The Court then deferred rendering its opinion pending a determination by the New York Court of Appeals on the appeal to that Court in the *Marine Midland Bank-Central* case. The State Tax Commission then brought to the attention of the Court, upon permitted intervention, the decision in *Matter of Thriftway* by the 2nd Circuit and in the *United Casket Co., Inc.* case in the District Court.

The New York Court of Appeals, in a decision dated May 1, 1979, supra, affirmed the order of the Appellate Division, 4th Dept., in the *Marine Midland Bank* case, and stated that although it agreed with the result reached below, it took the occasion to clarify the procedural steps necessary to convert a State tax warrant into a perfected lien upon the property of a delinquent taxpayer, and held that "the fact that Section 1141 (subd. (b)) authorizes the Sheriff to proceed upon a docketed warrant in the same manner as executions issued against the property of a judgment debtor refers only to enforcement as distinguished from perfection of the lien", citing *Matter of United Casket Co., Inc., Matter of Thriftway* and *Corrigan* v. *United States Fire Ins. Co.*, see Appendix (App. pp. 18a-20a).

This reference to Section 1141, subd. (b), and the clarification by the New York Court of Appeals, it is respectfully submitted, constituted a dictum which need not be followed, as it was not in contention before the Court in view of the affirmance of the Order of the Appellate Division. The Court of Appeals, 2nd Circuit, then, because of the interpretation by the Court of Appeals of the State of New York of Section 1141, subd. (b), of the New York Tax Law, affirmed substantially for the reasons set forth in Judge Mishler's opinion in the District Court, and because of *Matter of Thriftway*, see Appendix (App. pp. 10a-17a). A motion by petitioners to the New York



Court of Appeals in the *Marine Midland Bank* case for permission to present a motion for reargument as amici curiae to present the arguments herein propounded, was dismissed by that Court upon the ground that movants had no standing to seek reargument.

## Reasons for Granting the Writ

### I

**Mere dictum in the decision of the New York Court of Appeals should not be received as conclusive evidence of the law of the State, and the Court should not be bound by any part of the opinion which was not necessary to the ascertainment of the right or title in question between the parties, particularly when it is contrary to the stare decisis of the State, and the statute sought to be construed, read in its entirety.**

In *New England Mut. Life Ins. Co.* v. *Mitchell*, 118 F. 2d 414, Circuit Court of Appeals, 4th Circuit 1941, the Court held that the dictum did not even have persuasive value, and added:

> "But we would not feel bound to follow it in any event. We recognize, of course, our duty to ascertain and apply the law of Virginia to the facts of the case; but mere dicta has never been received as conclusive evidence of the law of any state, and clearly they ought not to be followed when opposed to what we regard as the sound and reasonable rule arising out of the common law of the state."

The Court also at one point refers to "the maxim of common law, stare decisis".

It added,

> "And therefore this court, and other courts organized under the common law, has never held itself bound

by any part of an opinion, in any case which was not needful to the ascertainment of the right or title in question between the parties".

The Appellate Division, 4th Dept. of the State of New York, had previously held that State tax liens, although perfected upon docketing, are extinguished if a levy is not made within sixty days for property capable of delivery and ninety days for property not capable of delivery which is the lifetime of a judgment execution, basing such determination on CPLR 5230, subd. "c" and CPLR 5232. *Marine Midland Bank-Central* v. *Gleason, et al.,* 62 App. Div. 429 (1978).

In its dictum, the Court of Appeals of the State of New York stated that in its view, the fact that Section 1141, subd. (b), of the New York State Tax Law "authorizes" the sheriff to proceed upon a docketed tax warrant in the same manner as executions issued against the property of a judgment debtor, refers only to enforcement as distinguished from perfection of the lien. Thus, the lien would continue effective against personal property of the debtor taxpayer, although nothing is done, even over a period of twenty years to levy on the lien.

In *Smith* v. *Erwin,* 77 N.Y. 466 (1879), the New York Court of Appeals examined a case where judgment had been entered, execution had been issued and delivered to the sheriff thereon, with a direction by the plaintiffs not to use or act upon the execution, or to make any levy until further orders from them. During the life of the execution, the debtor had, in his opinion, visible possessions, abundant personal property to satisfy any levy. The Court held:

> "To obtain this lien, it is not sufficient merely to place an execution in the hands of the sheriff. It must be issued *to be executed.* Here it was delivered



> to the sheriff not to be executed. He was to hold it and do nothing with it, until further orders. The plaintiffs had the right thus to direct him; and while he thus held the execution, he became their agent. The execution was dormant, and no lien was thereby acquired upon Ward's property." (emphasis added)

In *Walker* v. *Henry,* 85 N.Y. 130, the Court held:

> "For the enforcement of a lien or an execution, a levy and sale is necessary, and such levy should have been made during the life-time of the execution, and no constructive levy can arise or be presumed from the mere delivery of the execution . . . If the judgment creditor had any right under the execution, it should have been enforced. And in failing to do this, he lost all claim to a lien . . . ."

In *Excelsior Needle Co.* v. *Globe Cycle Works,* 43 App. Div. 304, the Court held:

> "The law is quite clear that the object of the execution is to enforce the judgment debt, and not to convert it into a security upon the property, and still allow the judgment debtor to prosecute his business regardless of the lien of the execution. . . .
>
> In *Storm* v. *Woods,* 11 John. 110, the property, after the levy by execution, was allowed to remain in the hands of the judgment debtor for nearly a year, with the acquiescence of the owners of the judgment. The debtor used the property in all respects as before the levy, and this unrestricted dominion over it continued until a levy was made by virtue of the second execution.
>
> There was no suggestion of fraud in the conduct of the owners of the judgment. They were actuated by the laudable object of giving the debtor time to meet the

judgment, and believed there was no interruption in the lien of their levy. The court, however, held their execution had beccome dormant by this remissness on their part, and the second execution was the prior lien. . . .

The law, therefore, seems to be settled that any direction by the execution creditor to the sheriff which suspends the lien or delays the enforcement of the levy renders the execution dormant against any subsequent creditors or bona fide purchasers. However veiled may be the direction, however much it may be founded on a humane desire to protect the debtor, if it is tantamount to a mandate or instruction to the sheriff to withhold the execution of his process during the interim that he accedes to this demand the levy ceases to be effective. That doctrine rests on public policy and is necessary to prevent fraud and it should receive a fairly vigorous enforcement."

We must note that *In re Matter of Thriftway,* it was held that the effect of filing a tax warrant was that it constructively acted as an execution. In *Vance Boiler Works* v. *Cooperative Feed Dealers Inc., et al.,* 46 Misc. 2d 654, 260 N.Y.S. 2d 303 (1965) (Supreme Court, Wayne County, New York), the Court held that the levy became void sixty days after service of the execution upon debtor, since no extension of the effective time had been obtained, and no specific property was taken into possession.

Since the New York Court of Appeals held in *Smith* v. *Erwin,* supra, that an execution must be issued to be executed, and since the statute Section 1141, subd. (b), provides that upon the docketing of the warrant in the judgment docket, the Sheriff shall proceed upon the warrant in the same manner and with like effect as that provided by law in respect to executions issued against property upon judgments of a court of record, and since, as directed by the statute, and by the warrant, the Sheriff



was "commanded" to sell the personal property of the debtor and to return the warrant and the money collected within sixty days, and if not satisfied in full, new warrants may be issued, not merely does the warrant fall after the sixty day period, but the lien that arises therefrom should similarly fall.

There is no basis for isolating the single sentence that relates to the amount of the warrant becoming a lien, and a finding that the lien continues and is perfected, and that the other mandatory provisions (not "authorizations") relate to enforcement and not perfection of the lien. The statute must be considered in entirety. To do otherwise, and to follow the *Thriftway* case would be to perpetuate error. In this instance, the lien is based on a simulacrum of an execution.

## II

**Section 1141, subd. (b) of the New York Tax Law and the tax warrant issued, specifically command the Sheriff to proceed to levy upon and sell the real and personal property of the taxpayer, and to return the warrant and the monies collected thereon within sixty days. The warrant must be issued to be executed upon.**

The New York Court of Appeals found that Section 1141, subd. (b) "authorizes" the Sheriff to proceed upon a docketed tax warrant in the same manner as executions issued against the property of a judgment debtor, and that that referred only to enforcement, as distinguished from perfection of the lien created by such Section. Neither the statute nor the warrant so provide.

Section 1141, subd. (b), must be read in its entirety. It is entitled "Proceedings to recover tax" and not "Proceedings to obtain a lien", or "Proceedings to enforce collection". The very first sentence in that subdivision

is a mandate to the Sheriff, as it provides for the issuance of the warrant directed to the Sheriff "*commanding* him to levy upon and *sell* the real and personal property of any person liable for the tax, which may be found within his county, for the payment of the amount thereof . . . and to return such warrant to the tax commission and *to pay it the money* collected within sixty days after the receipt of such warrant." (emphasis added)

The section further provides that if the warrant is returned not satisfied in full, new warrants may be issued with the same remedies to enforce the amount due thereunder, as if the state had recovered judgment and execution had been returned unsatisfied.

The language contained in each warrant is most important and is explicit. Each warrant provides as follows:

> "And We Further Command You that you satisfy said claim of said State Tax Commission for said tax with penalties and interest out of the real and personal property in said county belonging to said debtor and the debts due to him at the time when said copy of this warrant is so docketed in the office of the clerk of such county or at any time thereafter; and that only the property in which said debtor . . . has an interest or the debts owed to him shall be levied upon or sold hereunder; and return this warrant and pay the money collected, within sixty days after the receipt thereof, to the State Tax Commission of the State of New York." (D.A., p. 68).

This, too, as does the statute, commands the sheriff to satisfy the claim for taxes out of the real and personal property in said county and that the property owned by the said debtor shall be levied upon and sold thereunder, and that the warrant is to be returned with the money collected within sixty days after the recipt thereof. This is not a request, but a command.



It should further be noted that after the amount of the warrant, so docketed, becomes a lien upon the real and personal property of the person against whom the warrant is issued, provision is made that

> "The sheriff shall *then* proceed upon the warrant in the same manner and with like effect, as that provided by law in respect to executions issued against property upon judgment of a court of record. (emphasis added).

There is no reservation whatever in subd. (b) of Section 1141 which can be considered in the nature of an authorization, as distinguished from a direction or command. The Section, read in its entirety, is not ambiguous. The language of the warrant and the language of the Section apply to one continuous series of steps which relate to the proceeding to recover the tax. The State Tax Commission could have proceeded other than as specifically provided in subd. (b) of Section 1141. Under subd. (a), it could have turned the collection of the tax over to the Attorney General to bring an action to enforce the payment of the tax on behalf of the State of New York.

Further, the affirmative action of the State Tax Commission in entering into a stipulation providing for weekly payments of the amount of the tax which would have required payments by the taxpayer over a minimum period of 38 weeks, very conclusively proved that the State had no intention of proceeding with a levy within the period contemplated by CPLR 5230 of the State of New York, subd. (c), but was making other arrangements for payment akin to instructions to a sheriff not to proceed on any execution. If the entry of the judgment results in a lien, and such entry of judgment constitutes notice of a lien, and the entry, in addition, constitutes an execution, as determined in the *Matter of Thriftway,* then, under New York State law, the execution must be issued to be executed. Failing that, the lien would have no validity.

It should be noted that customarily and traditionally, the entry of judgment did not give notice of a lien against personal property and did not constructively act as an execution against personal property. *State Tax Commission* v. *Shor,* 43 N.Y. 2d 151 (November 21, 1977).

It should further be pointed out the requirement under the statute which was a direction to the Sheriff commanding him to levy upon and sell the real and personal property of the person liable for the tax and to return the warrant to the Tax Commission and to pay it the money collected by virtue thereof, within sixty days after the receipt of such warrant, is, under the wording of the statute, mandatory. How could such a return be made within sixty days in view of the stipulation providing for payments over a period of 38 weeks, with no new warrants being issued, as provided by the statute? The warrant does not sustain the lien unless it is executed upon. The warrant must be issued to be executed. *Smith* v. *Erwin, supra.*

## III

### The equities require a strict interpretation of Section 1141 (b) of the New York State Tax Law.

The State Tax Commission had previously argued that an immediate levy would usually destroy the taxpayer, depriving the State of jobs and capital and depriving the taxpayer of the opportunity to rebuild himself by entering into an installment payment plan. How could a taxpayer rehabilitate himself if creditors were to be informed of the tax lien against the personal property of the debtor which would not merely prevent the taxpayer from getting additional credit, but would also extend the lien over the property so acquired on credit? Under the Uniform Commercial Code of the State of New York, while there is a prior security interest creditor who has filed a financing statement to show such security interest, a purchase money



creditor can, by notice to such prior security interest creditor, sell merchandise and protect his interest on a secured basis. This cannot be done against an alleged State tax lien where, if the determination of the United States Court of Appeals for the Second Circuit and that of the New York Court of Appeals are upheld, a lien can remain against the personal property of the debtor interminably, or at least up to twenty years, without action being taken against the property of the debtor. This makes it necessary for any vendor seeking to sell merchandise firstly to search the judgment records for the period of the prior ten years to determine that there is no lien against the personal property of the vendee.

Similarly, a consumer seeking to purchase property, and paying a deposit on account of the purchase price, may lose both his property and his deposit if the State thereafter proceeds on its lien.

It should be noted that the alleged lien created and referred to in *United States* v. *State of Vermont,* 377 U.S. 351, differed from that in this case, in that it did not provide for a mandate or command to levy upon and sell the personal property of the taxpayer and return the warrant within sixty days, as is provided in Section 1141, subd. (c) of the New York State Tax Law. Further, in the case of *United States* v. *Gilbert Associates,* 345 U.S. 361, without questioning that the lienor was identified, the amount of the lien certain or the property subject to the lien definite, the Court accorded priority to subsequently arising claims on the ground that:

> " 'In claims of this type "specificity" requires that the lien be attached to certain property by reducing it to possession, on the theory that the United States has no claim against property no longer in the possession of the debtor. • • • The taxpayer had not been divested by the Town of either title or possession. The Town, therefore, had only a general, unperfected lien.' Id., 345 U.S., at 366, 73 S. Ct., at 704."

In the case of *United States of America* v. *Louis F. Davis,* 247 F. Supp. 84, the Court stated:

> "In the instant case it is not disputed that while the County complied with the statutory requirements for a specific and perfected lien, it did not reduce the property of the insolvent taxpayer to possession. Thus, the lien of the County does not meet the standard of specificity set forth in *United States* v. *Gilbert Associates,* supra."

The questions presented by this case are of great and recurring significance in the ordinary vendor-vendee relationship. The serious questions of public policy involved here and the effect of the decision below, if unreversed, will make intolerable, burdensome and extremely difficult the ordinary sales practice in industry, and require a judgment search over a period of twenty years before any simple sale of merchandise to any vendee, or before a deposit is tendered by a consumer on a proposed purchase.

## CONCLUSION

**For the reasons set forth in this petition, the Court should grant certiorari.**

Respectfully submitted,

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## APPENDIX

### New York Tax Law, Section 1141, subd. (b) (McKinney's 1969).

SALES AND USE TAX

Section 1141—

(b) As an additional or alternate remedy, the tax commission may issue a warrant, directed to the sheriff of any county commanding him to levy upon and sell the real and personal property of any person liable for the tax, which may be found within his county, for the payment of the amount thereof, with any penalties and interest, and the cost of executing the warrant, and to return such warrant to the tax commission and to pay it the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the county clerk a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax, penalties and interest for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant is issued. The sheriff shall then proceed upon the warrant, in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner. In the discretion of the tax commission a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of taxation and finance, and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but shall be entitled to

*New York Civil Practice Law and Rules—Sect. 5230, subd. (c)—(McKinney's 1968).*

no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the tax commission may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the state had recovered judgment therefor and execution thereon had been returned unsatisfied.

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**New York Civil Practice Law and Rules—Sect. 5230, subd. (c)—McKinney's 1968).**

NEW YORK CIVIL PRACTICE LAW AND RULES

Section 5230—

Subd. (c) Return. An execution shall be returned to the clerk of the court from which it was issued within sixty days after issuance unless the execution has been served in accordance with section 5231 or subdivision (a) of section 5232. The time may be extended in writing for a period of not more than sixty additional days by the attorney for the judgment creditor. Further like extensions may be given by the attorney for the judgment creditor unless another execution against the same judgment debtor has been delivered to the same enforcement officer and has not been returned.



**Decision and Judgment of Hon. C. Albert Parente, Bankruptcy Judge, (excerpted), dated December 9, 1977.**

This Decision is excerpted and there is omitted that part that relates to a determination that administration expenses and wage claims were to be paid out of the share of the New York Tax Commission. The State is not appealing such determination.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Bankruptcy No. 76-B-2740

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In the Matter of
UNITED CASKET CO., INC.,

Bankrupt.

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YORK-HOOVER CORPORATION and
ELGIN METAL CASKET CO., INC.,

Plaintiffs,

against

UNITED CASKET CO., INC., DEPARTMENT OF TAXATION & FINANCE OF THE STATE OF NEW YORK and INTERNAL REVENUE SERVICE OF UNITED STATES OF AMERICA,

Defendants.

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The captioned adversary proceeding was commenced during the pendency of the Chapter XI phase of this case by York-Hoover Corporation and Elgin Metal Casket Co., Inc. (hereafter collectively referred to as 'Plaintiff'), pursuant to Rule 701, et seq., Rules of Bankruptcy Procedure, seeking the relief following:

a) That the automatic stay provisions contained in Rule 11-44, Rules of Bankruptcy Procedure, be vacated and

*Decision and Judgment of Hon. C. Albert Parente, Bankruptcy Judge, (excerpted), dated December 9, 1977.*

b) That the Court grant a declaratory judgment finding Plaintiff's security interest paramount and superior to the tax liens asserted by New York State and the Internal Revenue Service.

Internal Revenue Service having conceded on the record that its federal tax lien is subordinate to the security interest of the Plaintiff and the liens of the State of New York renders its claim moot for the purposes of this decision.

A digest of the facts follows:

On April 8, 1976 New York State filed three tax warrants against the Bankrupt in the sums of $36,429.73, $13,627.64 and $35,516.86. The first warrant was ultimately satisfied on September 7, 1976 leaving a balance due on the remaining warrants of $49,144.50.

Plaintiff, on May 3, 1976, was granted a security interest in the Bankrupt's inventory, accounts, contract rights and general intangibles then owned or thereafter acquired by the Bankrupt.

At this point in time the Bankrupt's indebtedness to the Plaintiff for goods sold and delivered and monies advanced, pre-petition, aggregated to the sum of $201,736.37. Plaintiff duly perfected its security interest on or about May 12, 1976 by filing the requisite financing statements with the Secretary of State and Registrar of Queens County. Thereafter, the Plaintiff extended further credit and monies to the Bankrupt. At the time that the Chapter XI petition was filed; viz., on September 24, 1976, Plaintiff claimed its secured interest had accumulated to the sum of $327,500.02.

The Bankrupt operated as a debtor-in-possession from September 27, 1976 to February 16, 1977 when the Chapter XI aborted and adjudication ensued.



*Decision and Judgment of Hon. C. Albert Parente, Bankruptcy Judge, (excerpted), dated December 9, 1977.*

By order dated April 15, 1977, the trustee in bankruptcy was authorized to intervene as a party defendant. An answer to Plaintiff's complaint was interposed joining issue and coordintae therewith invoking the provisions of § 67c (3) of the Bankruptcy Act.

The facts are not in dispute. Accordingly, the parties have submitted the case, pursuant to Rule 56 of the Federal Rules of Civil Procedure, as a motion for summary judgment based upon the pleading.

The facts are not in dispute. Accordingly, the parties

1. Between the Plaintiff and the State of New York the dispositive factor posits upon which of the respective parties is entitled to a right of priority to the Bankrupt's assets.

2. Should it be determined that the State of New York has a prior right to the Bankrupt's assets, then the issue trisects into the sequent subdivisions:

   a) Whether the State of New York tax liens are subject to the provisions of § 67c (3) of the Bankruptcy Act postponing payment to the cost and expenses of administration and priority wage claims (§ 64a(1) and (2)).

   b) In corollary context, whether the security interest of the Plaintiff is likewise subordinate to the cost and expenses of administration and payment of priority wage claims, and

   c) Whether the New York State Department of Taxation and Finance is to receive payment in full of its tax liens prior to the Plaintiff's participation in the estate.

The New York State Department of Taxation and Finance contends that the Tax Law of the State of New

York and, in particular, § 1141 (McKinney's 1966), stands for the proposition that the docketing of the tax warrants on April 8, 1976 created a valid and subsisting lien upon the Bankrupt's property.

In counterposition thereto, Plaintiff argues that New York State was required to do more than merely file the liens in order to continue their perfection as against subsequent lienors.

The Plaintiff, ostensibly, seeks to draw an analogy between the facts at bar to that of a judgment creditor lienor who has failed to extend his lien by levy or as otherwise provided for in the CPLR of New York State. The analogy is inapt.

The CPLR does not provide that the mere docketing of a judgment creates a lien upon the personal property of a judgment debtor where the personal property is capable of delivery (seized). A sheriff's levy is required before a lien can attach to the personalty.

New York Tax Law, § 1141, however, differs graphically from the provisions of the CPLR. It explicitly provides that the mere docketing of the tax warrant shall create a lien upon the debtor's personalty. The language of the statute in relevant part is clear, convincing and unequivocal:

> "Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant is issued."

The sixty-day execution period mentioned in § 1141 of the New York Tax Law proscribes the State's procedure in enforcing the statutory edict, but it does not limit or qualify the efficacy of the lien once properly docketed.

Confronted with a strikingly similar question, the Second Circuit Court of Appeals in the case of *In the Matter of Thriftway Auto Rental Corp.*, 457 F. 2d 409 (2nd Cir. 1972), held that the filing of a tax lien by the City of New York under the Administrative Code created a lien upon the Bankrupt's assets notwithstanding the fact that the City took no steps to seize the Bankrupt's property or otherwise enforce the lien. The court articulated the causative effect of the filing of a tax warrant in the context following:





1) It creates a lien

2) It serves to give notice of the lien

3) It constructively operates as an execution

The statute involved in *Thriftway,* supra, follows exactly the statute relied upon by New York State herein. The verbiage is almost identical; moreover, the *Thriftway* decision was not novel in its approach but followed ample precedent for the ruling. See In Re *Argiriou & Finkel* v. *Marciante Luncheonette II, Inc.,* 64 Misc. 2d 660, 315 N.Y.S.2d 448 (1970); In re *DeKalb Ave. Reconstr.,* 11 A.D. 2d 240, 205 N.Y.S.2d 125, aff'd. 12 N.Y.2d 1051, 239 N.Y.S.2d 880 (1963); In Re *Lum's 52nd St. Corp.* (S.D.N.Y. 1963), 61 B 194, Bankr. Judge Herzog.

It is axiomatic in law that "first in time is first in right" . . . In Re *United States* v. *City of New Britain, Conn.,* 347 U.S. 81 (1954). As previously stated, the Plaintiff entered into the security agreement with the Bankrupt on May 3, 1976 and perfected its interest, pursuant to U.C.C. 9-401 (McKinney's 1964), on May 12, 1976. However, the subject matter of the collateral granted the Plaintiff was already encumbered by the New York State tax liens as of April 8, 1976.

An examination of the County Clerk's office would have revealed the existence of the liens. The Plaintiff cannot be held to argue that the Bankrupt represented to them

that the collateral was free and clear of encumbrances. Such representation could not affect, in any way, the State's right as provided for by law.

Plaintiff's reliance, in part, upon *Lacaille* v. *Feldman,* 44 Misc. 2d 370, 253 N.Y.S.2d 937 (1964), is untenable and demonstrates that the Plaintiff has apparently misread the court's holding in that case.

Although Judge Levy stated that the state's common law rights of priority can be defeated by a lien asserted prior to the enforcement of the state's priority, Judge Levy actually held that the state's tax lien filed in 1960 had priority over the judgment creditor who had executed his judgment in 1963. The other tax liens involved were not given priority because more than ten years had elapsed since their filing and said liens had been nullified by process of law. At page 957, Judge Levy stated:

> "Thus it is that I hold that as between the petitioners and the state, the last tax warrant is the only one entitled to first priority."

The confusion with the decision rests upon the fact that the State asserted both a statutory and common law right. With respect to the common law right, the court held that it was defeasible by subsequent lienors, but not as to the statutory right to priority.

Accordingly, *Lacaille* v. *Feldman,* supra, in fact supports the State's and trustee's positions at bar since it is a statutory right of priority and not a common law right which is here in issue and sought to be enforced by the State.

Premised upon the foregoing, I find as a matter of fact and law that the tax liens of the State of New York





Department of Taxation and Finance are prior in right and superior to Plaintiff's security interest.

Consonant with the above, I find that the State of New York has priority over the secured party (Plaintiff) subject, however, to payment of § 64a (1) and (2) claims. The collection of the balance of its lien must await payment in full to the secured party.

This is a declaratory judgment binding upon ultimate distribution herein.

C. ALBERT PARENTE
C. Albert Parente
Bankruptcy Judge

Dated: December 9, 1977
Westbury, N.Y.

**Memorandum Decision of Hon. Jacob Mishler, Chief Judge, United States District Court, Eastern District of New York, dated March 27, 1978.**

This Decision is excerpted for the same reason as that of the Bankruptcy Court.

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In the Matter of
UNITED CASKET CO., INC.,

Bankrupt.

YORK-HOOVER CORPORATION and
ELGIN METAL CASKET CO., INC.,

Plaintiffs,

v.

UNITED CASKET CO., INC.; DEPARTMENT OF TAXATION & FINANCE OF THE STATE OF NEW YORK; and INTERNAL REVENUE SERVICE OF UNITED STATES OF AMERICA,

Defendants.

---

York-Hoover Corp. together with Elgin Metal Casket Co. ("York-Elgin") and the New York State Department of Taxation & Finance ("State") separately appeal from a decision rendered by Bankruptcy Judge C. Albert Parente on December 9, 1977, in an adversary proceeding which concerned the priority of various claims. York-Elgin appeals from that aspect of the decision which found the State possessed of a valid and prior tax lien on the bankrupt's assets (78 C 78). The State appeals from that part of the holding which postponed payment on a portion of its claim (78 C 196). Related as they are, we consolidate the appeals.[1]

[1] There being no opposition to York-Elgin's motion for consolidation, the motion is granted.



*Memorandum Decision of Hon. Jacob Mishler, Chief Judge, United States District Court, Eastern District of New York, dated March 27, 1978.*

The essential facts are not in dispute. Prior to its adjudication in bankruptcy, United Casket Co. was a manufacturer of burial vaults and caskets. Failing financial conditions in 1975 caused the firm to ignore several sales tax assessments filed by the State during the latter part of that year. The State, on April 7, 1976, issued three warrants commanding the sheriff, after filing the warrants with the county clerk, to levy upon and sell United's property in satisfaction of the tax deficiency. The warrants were duly filed, but no levy followed. Instead, the parties executed an agreement which permitted United to pay the debt in weekly installments. The required payments were made until the commencement of Chapter XI proceedings; at present the deficiency stands at $49,144.50.

The York-Elgin claim derives from a security agreement executed on May 3, 1976. At that time, United was indebted to the claimants in an amount exceeding $200,000 for goods previously sold and delivered and monies advanced. In order to guarantee continued credit, United granted York and Elgin a security interest in all of its inventory, accounts, contract rights and general intangibles then owned or thereafter acquired. The security interest, embodied in an agreement executed on May 3d, was perfected on May 12, 1976 by the filing of requisite financing statements with the Secretary of State and Queens County Register. Thereafter, York and Elgin extended further credit on purchases of manufacturing supplies until the advent of reorganization proceedings.

By September 24, 1976, United's indebtedness to York and Elgin exceeded $325,000. Unable to meet its obligations, United, on that day, filed a petition for reorganization with the Clerk of the Court, pursuant to Chapter XI of the Bankruptcy Act. The petition was granted by order dated September 27, 1976, and United was continued as

*Memorandum Decision of Hon. Jacob Mishler, Chief Judge, United States District Court, Eastern District of New York, dated March 27, 1978.*

debtor-in-possession. A plan for reorganization was drawn, but could not be funded. Hence, on February 16, 1977, with open accounts receivable totaling $206,407.27, United was adjudicated bankrupt. Inventory and equipment were thereafter sold at public auction realizing some $25,550.

During the pendency of Chapter XI proceedings, York-Elgin filed suit in the bankruptcy court seeking relief from the general stay provisions contained in Rule 11-44, Rules Bankr. Proc., and a declaratory judgment determining the priority of their security interest vis-a-vis the liens purportedly possessed by the State Department of Taxation & Finance and the Internal Revenue Service.[2] The issue was submitted to the bankruptcy court on stipulated facts.

After hearing extended argument, the bankruptcy court, in a decision rendered on December 9, 1977, found the State possessed of a valid and prior lien by virtue of New York Tax Law § 1141(b) (McKinney's 1969). That provision, which sets forth the available enforcement procedures the State may follow in pursuing collection of a sales tax deficiency, permits the tax commission to issue warrants and thereupon levy on the taxpayer's assets. Warrants duly docketed with the county clerk, the section provides, "shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant is issued." New York Tax Law § 1141(b). Construing the statute to require nothing more than docketing, the bankruptcy court held the State's action sufficient to vest it with a prior lien notwithstanding its failure to levy on the personal property. However, the consequent lack

[2] The Internal Revenue Service, which filed a $4,109.06 federal tax assessment on September 27, 1976, has conceded that its lien is inferior to plaintiff's security interest and the State's tax lien.



*Memorandum Decision of Hon. Jacob Mishler, Chief Judge, United States District Court, Eastern District of New York, dated March 27, 1978.*

of possession accompanying the tax warrants, the bankruptcy court held, triggered the operation of § 67(c)(3) of the Bankruptcy Act, 11 U.S.C. § 107(c)(3), which postpones payment of the tax deficiency to the costs and expenses of administration and priority wage claims. Construing the statute further, the bankruptcy court went on to rule that the State would first have to await York-Elgin's participation in the estate before receiving payment of the postponed increment.

It is from this ruling that both sides appeal. York-Elgin takes issue with the first part of Bankruptcy Judge Parente's decision holding the State possessed of a prior lien. The State, in turn, attacks the other aspect of the ruling which further postpones payment of that increment of the tax lien representing the amount of administration and priority wage claims to plaintiff's participation in the estate. We turn first to examine the viability of the State's lien.

Section 1141(b) of the New York Tax Law provides in pertinent part:

> As an additional or alternate remedy, the tax commission may issue a warrant, directed to the sheriff of any county commanding him to levy upon and sell the real and personal property of any person liable for the tax, which may be found within his county, for the payment of the amount thereof, with any penalties and interest, and the cost of executing the warrant, and to return such warrant to the tax commission and to pay it the money collected by virtue thereof within sixty days after the receipt of such warrant. *The sheriff shall within five days after the receipt of the warrant file with the county clerk a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in*

> *the warrant and the amount of the tax, penalties and interest for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant is issued.* The sheriff shall then proceed upon the warrant, in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record . . . If a warrant is returned not satisfied in full, the tax commission may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the state had recovered judgment therefor and execution thereon had been returned unsatisfied. (emphasis added.)

Considering the frequent use of this enforcement alternative, the paucity of case law interpreting the command and reach of the statute is surprising.

The State, emphasizing the clarity of the underscored sections, argues that the simple filing of the warrants and their docketing by the county clerk is sufficient to create a choate lien on the bankrupt's real and personal property; that the statutory language of execution and levy only proscribes enforcement procedures and in no way limits or qualifies the efficacy of the lien once it properly attaches. York-Elgin on the other hand urges the court not to isolate the highlighted language, but to consider the full command of the statute. Pointing to that part of the provision which directs the sheriff to ". . . proceed upon the warrant in the same manner and with like effect, as that provided by law in respect to executions issued against property on judgments . . .," York-Elgin argues that the principles on which the attachment of judgment liens turn





also control the efficacy of state tax liens. More specifically, York-Elgin urges the relevance of Article 52 of New York's Civil Practice Law and Rules which pertains to the enforcement and priority of judgments. The mere docketing of warrants, York-Elgin argues, gives rise to a choate lien only on the debtor's real property, CPLR § 5203 (McKinney's 1972). Any lien attaching to personal property on docketing and issuance of the execution, York-Elgin contends, was of limited duration and fell when the State failed to levy on United's property either by seizure or service of the execution, CPLR §§ 5230 and 5232 (McKinney's 1968).

We cannot view the pertinent provision of the tax Law with the same myopic simplicity the State does. York-Elgin's suggested construction of § 1141(b) is at the very least persuasive. The statute, when considered in its entirety, can be logically read to grant the State, upon the docketing of tax warrants, a choate lien on the taxpayer's real property and an inchoate lien subject to perfection by levy on his personalty. Such a construction is entirely consistent with the requirements of CPLR Article 52 and the direction in § 1141(b) requiring the sheriff, after docketing, to proceed upon the warrant "in the same manner and with like effect" as under executions against property issued upon judgments. Moreover, such an interpretation lends meaning to the last sentence of the subdivision which permits the State to issue new warrants should the original be returned unsatisfied. *Accord; United States* v. *Weather Service, Inc.*, 74-2 U.S. Tax. Cas. 9724 (E.D.N.Y. 1974) (docketing of warrants in absence of levy does not give State "perfected" lien); *In Re Estate of Robbins*, 74 Misc. 2d 793, 346 N.Y.S. 2d 86 (Sur. Ct. 1973) (lien attaches to personalty only upon service of execution levies, not upon docketing); *Lacaille* v. *Feldman*, 44 Misc. 2d 370, 253 N.Y.S.

*Memorandum Decision of Hon. Jacob Mishler, Chief Judge, United States District Court, Eastern District of New York, dated March 27, 1978.*

2d 937 (Sup. Ct. 1964) (filing of warrant gives State equal parity with creditor who has docketed judgment; State obtains choate lien on real property and inchoate lien a personalty until levy.)

We must however, reject York-Elgin's interpretation in the face of the Second Circuit's decision in *In The Matter Of Thriftway Auto Rental Corp.*, 457 F. 2d 409 (2d Cir. 1972). There, the court was presented with a provision of almost identical language contained in New York City's Administrative Code (§ N46-11.0(b)), and was asked to construe the effect of docketed warrants unaccompanied by a sheriff's levy. The court, although noting the persuasiveness of the interpretation similarly urged by York-Elgin here, held that the mere docketing of tax warrant created a choate lien on the debtor's personalty. To construe the statute otherwise and treat with parity docketed warrants and judgments, the court reasoned, would render meaningless the subsection's third sentence declaring a warrant properly docketed a lien on the taxpayer's personal property. For the docketing of a private judgment under the CPLR, the court observed, ". . . creates no lien at all upon personal property, but merely enables a judgment creditor to obtain a lien through further action . . ." *Id.* 457 F. 2d at 411.[3] *See Corrigan* v. *United States Fire*

[3] York-Elgin, also, attacks the constitutionality of § 1141(b) arguing that the summary nature of the enforcement procedure which grants the State a lien on the taxpayer's property "without notice and an opportunity to be heard" violates the due process clause. The claim is specious. Section 1138 of the Tax Law requires the State, where proper sales taxes are not paid, to issue and serve a notice of assessment fixing the amount of the tax. The taxpayer, within ninety days thereof, can petition the commission for a hearing. Judicial review of an adverse decision, by way of an Article 78 proceeding, is available. Only after notice and an opportunity to be heard has been extended can warrants issue.



*Memorandum Decision of Hon. Jacob Mishler, Chief Judge, United States District Court, Eastern District of New York, dated March 27, 1978.*

*Insurance Co.*, 427 F. Supp. 940 (S.D.N.Y. 1977); *Argiriou & Finkel* v. *Marciante Luncheonette II, Inc.*, 64 Misc. 2d 660, 315 N.Y.S. 2d 448 (Sup. Ct. 1970); *United States* v. *Comptroller of the City of New York*, 248 F. Supp. 939 (S.D.N.Y. 1965); *In Re Lums 52nd Street Corp.*, 61-B-194 (S.D.N.Y. 1963); *In Re Saratoga Paint Co.*, 31 F. Supp. 514 (S.D.N.Y. 1940) *aff'd sub. nom. Davis* v. *City of New York*, 119 F. 2d 559 (2d Cir. 1941).

As it is, a warrant issued after a notice of assessment has gone ignored, unlike a docketed judgment, identifies the lienor, the property subject to the lien and its amount. As such, the test of choateness is sufficiently met. *United States* v. *Vermont*, 377 U.S. 351, 358, 84 S. Ct. 1267, 1271 (1964). To require more would resurrect the double standard in determining the choateness of federal and state liens, which was unanimously repudiated by the Supreme Court in *United States* v. *Vermont*. *Thriftway*, 457 F. 2d at 413. We find, therefore, that the State is possessed of a prior lien as the warrants were docketed before perfection of York-Elgin's security interest.

The decision of the bankruptcy courts is affirmed.

JACOB MISHLER
U. S. D. J.

**Memorandum Decision of State of New York, Court of Appeals, decided May 1, 1979.**

STATE OF NEW YORK

COURT OF APPEALS

Marine Midland Bank-Central,

Respondent,

vs.

Richard A. Gleason, et al.,

Appellants.

MEMORANDUM:

The order of the Appellate Division should be affirmed, with costs.

Although we agree with the result reached below, we take this occasion to clarify the procedural steps necessary to convert a State tax warrant into a perfected lien upon the property of a delinquent taxpayer. The Tax Law (§ 1141, subd [b]) provides that upon docketing of a tax warrant with the county clerk "the amount of such warrant so docketed shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant is issued."

We interpret this express language to grant the State a perfected lien upon the filing of a tax warrant without the further necessity of a levy. In so holding, we reject the conclusion reached by the Appellate Division that State tax liens, although perfected upon docketing, may be extinguished if a levy is not made within the lifetime of a judgment execution. (See CPLR 5230, subd [c].) In our view, the fact that section 1141 (subd [b]) authorizes the sheriff to proceed upon a docketed tax warrant in the



*Memorandum Decision of State of New York, Court of Appeals, decided May 1, 1979.*

same manner as executions issued against property of a judgment debtor refers only to enforcement, as distinguished from perfection of the lien. (See *Matter of United Casket Co.*, 449 F Supp 261, 263-264; cf. *Matter of Thriftway Auto Rental Corp.*, 457 F2d 409, 411-412; *Corrigan* v *United States Fire Ins. Co.*, 427 F Supp 940, 942-943.) It follows from this analysis that all three State tax warrants constituted perfected liens having priority over respondent's security interest. Thus, independent of the Federal tax lien, respondent's collateral was impaired in an amount sufficient to justify the recovery below.

* * * * * * * * * *

Order affirmed, with costs, in a memorandum. Concur: Cooke, Ch.J., Jasen, Gabrielli, Jones, Wachtler and Fuchsberg, JJ.

Decided May 1, 1979

## Order of State of New York, Court of Appeals, dated July 10, 1979.

STATE OF NEW YORK,

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the tenth day of July A.D. 1979

Present, HON. LAWRENCE H. COOKE, *Chief Judge, presiding.*

Mo. No. 621

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Marine Midland Bank-Central,

Respondent,

vs.

Richard A. Gleason & ors.,
Individually and d.b.a. a
partnership known as Gleason,
Foulke, Magill and Hewitt,

Appellants.

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A motion having heretofore been made upon the part of York-Hoover Corporation and Elgin Metal Casket Co., Inc. for permission to present a motion for reargument herein as amici curiae and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that movants have no standing to seek reargument.

Joseph W. Bellacosa
Clerk of the Court

JOSEPH W. BELLACOSA



## Order of United States Court of Appeals, dated July 16, 1979.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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IN THE MATTER OF UNITED CASKET CO., INC.,

*Bankrupt.*

YORK-HOOVER CORP. and EIGIN METAL CASKET CO., INC.,

*Appellants-Cross-Appellees,*

v.

UNITED CASKET CO., INC.,

*Appellee,*

*and*

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

*Appellee-Cross-Appellant,*

*and*

INTERNAL REVENUE SERVICE OF THE UNITED STATES,

*Defendant.*

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ORDER

Appeal from an order of the United States District Court for the Eastern District of New York, Mishler, C.J., affirming a decision of the Bankruptcy Court which set priorities for payment from the bankrupt's estate as between New York State tax liens, administration expenses and wage claims, and secured creditors.

Because the Appellate Division Fourth Department's interpretation of section 1141 of the New York Tax Law conflicted with that of the district court, *see Marine Mid-*

*Order of United States Court of Appeals, dated July 16, 1979.*

*land* v. *Gleason,* 62 App. Div. 2d 429, 435-37 (1978), we withheld decision in this matter pending review of *Marine Midland* by the New York Court of Appeals. In Memorandum Opinion No. 126, dated May 1, 1979 and not yet officially reported, the New York Court of Appeals rejected the Appellate Division's interpretation and adopted one consonant to that of the district court. Accordingly, we affirm, substantially for the reasons set forth in Judge Mishler's opinion. *See also In re Thriftway Auto Rental* v. *Herzog,* 457 F.2d 409, 411-12 (1972).

Wm. H. Timbers
HON. WILLIAM H. TIMBERS
United States Circuit Judge
Ellsworth A. Van Graafeiland
HON. ELLSWORTH A. VAN GRAAFEILAND
United States Circuit Judge
Charles L. Brieant, Jr.
HON. CHARLES L. BRIEANT, JR.
United States District Judge

July 16, 1979.

Supreme Court, U. S.
FILED
NOV 2 1979
MICHAEL RODAK, JR., CLERK

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-588

In the Matter of

UNITED CASKET CO., INC.,

*Bankrupt.*

YORK-HOOVER CORP. and ELGIN METAL CASKET CO., INC.,

*Petitioners,*

vs.

UNITED CASKET CO., INC.,

*Respondent,*

and

DEPARTMENT OF TAXATION AND FINANCE
OF THE STATE OF NEW YORK,

*Respondent.*

## BRIEF OF THE RESPONDENT UNITED CASKET CO., INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-588

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In the Matter of
UNITED CASKET CO., INC.,
*Bankrupt.*

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YORK-HOOVER CORP. and ELGIN METAL CASKET CO., INC.,
*Petitioners,*

vs.

UNITED CASKET CO., INC.,
*Respondent,*

and

DEPARTMENT OF TAXATION AND FINANCE
OF THE STATE OF NEW YORK,
*Respondent.*

---

## BRIEF OF THE RESPONDENT UNITED CASKET CO., INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The respondent, United Casket Co., Inc., by Harold S. Berzow, Trustee in Bankruptcy, respectfully submits that the petition of York-Hoover Corp. and Elgin Metal Casket Co., Inc. (hereinafter referred to as "York-Elgin") for the issuance of a writ of certiorari, for the purpose of reviewing the order of the United States Court of Appeals for the Second Circuit entered on July 16, 1979, should be denied.

## Opinions Below

The Court is respectfully referred to pages 1 and 2 of the petition and the appendix to the petition with respect to the opinions below. Please note in this regard, however, that both the Bankruptcy Court and District Court opinions have been excerpted by the petitioners.

## Jurisdiction

The Court is respectfully referred to the presentation of jurisdiction set forth at page 2 of the petition, but respondent submits as more particularly set forth herein, that the facts of the within controversy are not contained within the ambit of the provisions of Rule 19 of the Rules of the Supreme Court.

Accordingly, the issuance of a writ of certiorari would be unwarranted in this case.

## Question Presented

Did the United States Court of Appeals correctly interpret the New York Tax Law, §1141, subd. (b) in light of the decision rendered by the New York State Court of Appeals in the case of *Marine Midland Bank-Central* v. *Gleason, et al.*



## Statement of the Case

The Court is respectfully referred to pages 4 through 9 of the petition. It should be noted, however, that prior to the time that the appeal was heard in *Marine Midland Bank-Central* v. *Gleason, et al.,* the respondent, the Department of Taxation & Finance of the State of New York, was granted permission to file a brief *amici curiae* and, the appellant in that case was granted permission to file the briefs of the petitioners herein, which briefs had been filed with the United States Court of Appeals. It would thus appear that the New York State Court of Appeals had the benefit of reviewing all of the arguments presented by both the petitioners and the respondent, the Department of Taxation and Finance of the State of New York.

## Reasons for Denying the Writ

The petitioners have not presented any issue within the "characters of reasons" set forth in Rule 19 of the Rules of the Supreme Court relating to the issuance of a writ of certiorari.

Moreover, this case relates solely to the interpretation of a New York statute which has recently been considered by the New York State Court of Appeals. The New York State Court of Appeals reviewed the petitioners' arguments with respect thereto and conclusively rejected petitioners' interpretation of the statute.

Accordingly, this Court should not review this case for it should be bound by the ruling of the New York Court of Appeals.

## I.

**The Court of Appeals for the Second Circuit Correctly Interpreted § 1141(b) of the New York Tax Law (McKinney, 1969) in Accordance With the Decision of the New York State Court of Appeals in *Marine Midland Bank-Central* v. *Gleason, et al.**

Rule 19 of the Rules of the Supreme Court sets forth the considerations governing review on certiorari to the Supreme Court. The case at bar does not involve a situation where a state court has determined a federal question of substance not previously determined by the Court or has decided a question not in accordance with a prior decision of the Court.

Furthermore, the case at bar does not present a pattern where decisions of the various Circuit Courts of Appeal are in conflict on the same matter, or where the decision of the Second Circuit Court of Appeals is in conflict with applicable state law. Quite to the contrary, the decision of the United States Court of Appeals gave explicit reference to proceedings pending before the New York State Court of Appeals on the question at bar and fashioned its Order in compliance and in conformity with the decision of the New York State Court of Appeals' interpretation of the import and effect of §1141(b) of the New York State Tax Law.

Furthermore, the case at bar does not present a situation where a federal court or a state court has decided a federal question in conflict with applicable decisions of the Court, or has so departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's supervisory powers.

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* 47 N.Y.2d 758, 391 N.E.2d 294, 417 N.Y.S.2d 458 (1979).



The United States Court of Appeals for the Second Circuit, being cognizant that the New York State Court of Appeals was considering the interpretation of § 1141(b) of the New York State Tax Law, carefully fashioned its decision to comport with the interpretation given to a New York State statute by the state's highest court.

## II.

**The Interpretation by the New York State Court of Appeals of a New York State Statute Is Binding Upon the Federal Court.**

It is well settled that the interpretation by a state's highest court of its own statutory law is binding upon the Supreme court absent an impingement upon a federal right, a conflict with the Constitution or with a federal statute. *Scripto Inc.* v. *Carson*, 362 U.S. 207, 210 (1960); *Williams* v. *Kaiser*, 323 U.S. 471, 473 (1945); *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church of North America*, 344 U.S. 94, 99 (1952); *Hebert* v. *State of Louisiana*, 272 U.S. 312, 316 (1926); *Skelly Oil Co., et al.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 674 (1950).

Title 28, § 1652 of the United States Code is on point. The case at bar does not present to the Court circumstances in which either the Constitution or treaties of the United States or Act of Congress require federal review of a question of state law. All federal court decisions are completely consonant with the opinion of the New York State Court of Appeals.

The Court has on many occasions stated, that the decisions of the state courts interpreting their local revenue statutes are binding upon the federal courts absent a conflict with federal law or the Constitution of the United

States. *P. J. Flanigan* v. *County of Sierra*, 196 U.S. 553, 562 (1905); *Dixie Greyhound Lines, Inc.* v. *McCarroll*, 101 F.2d 572, 574 (8th Cir., 1939); aff'd 309 U.S. 176 (1940); rehearing denied 309 U.S. 696 (1940); See also, *In re Mead-Haskell Co.*, 47 F. Supp. 997, 999 (S.D.Ca., 1942).

## III.

**The New York State Court of Appeals Decision in *Marine Midland Bank-Central* v. *Gleason, et al.*, Was Not a Departure From Prior Decisions but Merely a Reaffirmation of What the Law Is in New York State.**

The petitioners advance the argument that a writ of execution must be issued to be executed in order for a judgment creditor, under New York law, to obtain a lien upon the debtor's personal property, citing *Smith* v. *Erwin*, 77 N.Y. 466 (1879); *Walker* v. *Henry*, 85 N.Y. 130 (1881); *Excelsior Needle Co.* v. *Globe Cycle Works*, 48 App. Div. 304, 62 N.Y.S. 538 (4th Dept. 1900); *Vance Boiler Works* v. *Cooperative Feed Dealers, Inc., et al.*, 46 Misc. 2d 654, 260 N.Y.S. 2d 303 (Sup. Ct. 1965).

All of the aforementioned cases cited exclusively deal with a non-sovereign judgment creditor and, accordingly, have no application to the issues presented herein.

The petitioners have attempted to analogize this case to that of a non-sovereign judgment creditor who has failed to extend his lien by levy or as otherwise provided for by the Civil Practice Law & Rules of New York State. The analogy is misplaced. The New York Statute which sets forth the basis for creating a judgment creditor's lien upon personal property of a judgment debtor is strikingly different from the provisions of the New York Tax Law, § 1141. (McKinney 1975)



The Civil Practice Law & Rules (McKinney 1972) does not provide that the mere docketing of a judgment creates a lien against the judgment debtor's personal property where said property is capable of delivery. A sheriff's levy is required before a lien can attach to the debtor's personalty.

The rule is different, however, where the property is incapable of delivery (seizure). In that case the mere delivery of an execution to the sheriff creates a lien on the debtor's property. Cf., CPLR §§ 5234 and 5202 (McKinney 1978).

On the other hand, the New York Tax Law, § 1141, *supra*, provides that the mere docketing of the tax warrant shall create a lien upon the debtor's personalty.

It is readily apparent therefore, that the New York Legislature has provided different rights and privileges to the sovereign State of New York, as distinguished from the other creditors. See *Corrigan* v. *U.S. Fire Insurance Company*, 427 F. Supp. 940 (S.D.N.Y. 1977), where the court was faced with a similar issue as in the case at bar insofar as the construction New York Tax Law, § 1141 is concerned.

The Court in *Corrigan* v. *U.S. Fire Insurance Company, supra*, said at page 943:

> The United States argues that since an execution has not been issued to the sheriff, the lien against the fund has not been established. However, in these tax cases, the State does not have to issue a separate execution to the sheriff. It is clear from the three state statutes involved that the warrant is in effect an execution and has been delivered to the sheriff.

The United States Court of Appeals below, relied upon its own decision in the case of *In the Matter of Thriftway*

*Auto Rental Corp.*, 457 F.2d 409 (2nd Cir. 1972), which involved the exact issue presented in the case at bar and concluded that the filing of the tax lien by the City of New York under its Administrative Code created a lien upon the bankrupt's assets, notwithstanding the fact that the City had taken no steps to either seize the bankrupt's property or otherwise enforce the lien.

The statute involved in *In the Matter of Thriftway, supra*, follows exactly the same verbiage as set forth in New York Tax Law, § 1141(b).

The *Thriftway* decision, *supra*, was anything but novel in its approach for it rested upon ample precedent. See, *Argiriou & Finkel* v. *Marciante Luncheonette II, Inc.*, 64 Misc.2d 660, 315 N.Y.S.2d 448 (Sup. Ct. 1970); *In re DeKalb Ave. Constr.*, 11 A.D.2d 240, 205 N.Y.S.2d 125 (2nd Dept. 1960); aff'd, 12 N.Y.2d 1051, 190 N.E.2d 240, 239 N.Y.S.2d 880 (1963); *Lacaille* v. *Feldman*, 44 Misc.2d 370, 253 N.Y.S.2d 937 (Sup. Ct. 1964) and *In re Estate of Robbins*, 74 Misc. 2d 793, 346 N.Y.S.2d 86 (Surr. Ct. 1973).

In the case of *In re Estate of Robbins, supra*, the court was faced with the question of priority as between the State of New York and a bank which had obtained a judgment against the decedent prior to the time that the state had filed its warrant. The court stated in the body of its opinion, the following:

> The State Tax Commission is, however, entitled to priority under the rule giving priority to claims of the State as sovereign over other general liens. The claim of the State Tax Commission is based upon its warrants which have the same effect as judgments for taxes due from the debtor. Such claims are preferred except where a creditor has obtained a prior specific lien. *Matter of Carnegie Trust Co.*, 206 N.Y. 390, 99 N.E. 1096; *Matter of Gruner*, 295 N.Y. 510, 68 N.E.2d 514, rearg. den., 296 N.Y. 668, 69 N.E.2d 822; *Smith* v. *Meader Pen Corp.*, 255 App. Div. 397, 8 N.Y.S.2d 39; aff'd wo. op. 280 N.Y. 554, 20 N.E.2d 13; *Witas* v. *Carlson*, 201 Misc. 201, 202, 110 N.Y.S.2d 659, 661, in which it is stated, 'The rule is well settled that monies and taxes due the state have a priority over all other general liens and may be superseded only by a prior specific lien obtained by a creditor.' *Id.* at p. 91.



It is thus apparent that the Court of Appeals of the State of New York in *Marine Midland Bank-Central* v. *Gleason, et al., supra*, did not depart in any way from what the law in New York had always been with respect to New York's rights under a filed tax warrant.

## IV.

**The New York State Tax Warrant Having Been Sufficiently Choate to Create a Lien Upon the Bankrupt's Personalty and Having Been Docketed Prior to the Security Interest of the Petitioners Was Therefore Prior in Right.**

The petitioners advance the argument that because the State of New York failed to levy upon the warrant and reduce the debtor's property to possession, that the ruling in this case should be controlled by the decision of *United States* v. *Gilbert Associates*, 345 U.S. 361 (1953).

We infer from the petitioners' reliance upon *United States* v. *Gilbert, supra*, that they are raising the choateness doctrine as it applies to the New York tax warrant.

In response to this, we point out that the choateness doctrine as developed by the federal courts applied essen-

tially to those situations where a federal claim is in competition with other lienors with respect to a debtor's property. See *Illinois* v. *Campbell,* 329 U.S. 362 (1946) and *Osborne* v. *State of Florida,* 164 U.S. 650 (1897).

Although the Internal Revenue Service was a party defendant when this case began, early in the proceedings, the Internal Revenue Service withdrew after having conceded that the Internal Revenue Service's lien against the bankrupt was subordinate to the liens asserted by the petitioners and the NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE. This being the case, the federal choateness doctrine has no application in the case.

The respondent herein submits that even if the Court was to consider this case as coming within the federal choateness doctrine, then, in such event, a careful analysis of the New York tax warrant and a lien created by New York State Tax Law §1141 would meet the test for choateness as established by *United States* v. *City of New Britain,* 347 U.S. 81 (1954).

The standards established by *United States* v. *City of New Britain, supra,* are that there must be an identity of the lienor and the property subject to the lien and the amount of the lien established. New York State Tax Law §1141 meets all the criteria delineated in the *New Britain* case, *supra.* See also, *United States* v. *Vermont,* 377 U.S. 351 (1964).

In the instant case, New York State filed its tax warrant on April 8, 1976. On May 12, 1978, the petitioners filed their financing statements under the New York Uniform Commercial Code and thus perfected their security interest in accord therewith.

The State of New York, having been prior in time, is therefore prior in right. See *Rankin & Schatzell* v. *Scott,*



12 Wheat. (25 U.S.) 177 (1827), in which Chief Justice Marshall stated the rule as follows:

> The principle is believed to be universal that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds . . .

The petitioners urge upon the Court as a basis for granting certiorari that by permitting the Court of Appeals decision to stand, industry will be intolerably burdened with the requirement of making a tax warrant search to ascertain whether or not there is a prior perfected lien on a debtor's property.

This statement is a gross exaggeration of the entire problem. Under New York Law, the Department of Taxation & Finance of the State of New York files a tax warrant with the County Clerk's office where the debtor has its residence or principal place of business which is the very place where all judgments are docketed against a resident debtor.

A careful examination of the County Clerk's Office in this case would have clearly have revealed the existence of the New York State liens. The petitioner's failure to make a diligent search is at the very root of this controversy. If the petitioners made a search and inspection for prior Uniform Commercial Code financing statements, they likewise could have made an inspection of the County Clerk's records and would have resolved any doubts as to whether or not the bankrupt's property was encumbered and they would not have had to rely upon representations contained in a boiler plate form of agreement to the effect that the bankrupt's property was free and clear of encumbrances.

Parenthetically, we note that the representations made by the bankrupt could in no way affect the State of New

York's rights as provided for by law. This is not a case where the burden of searching a local filing office's records creates an impediment to industry and commerce among the several states.

## CONCLUSION

For all of the reasons set forth above, it is respectfully requested that the petition for a writ of certiorari be denied for there is no issue before this court of a magnitude to require to the issuance of such a writ.

Dated: October 24, 1979

Respectfully submitted,

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# APPENDIX

# APPENDIX

New York Tax Law, Section 1141, subd. (b)
(McKinney 1975)

SALES AND USE TAX

Section 1141—

(b) As an additional or alternate remedy, the tax commission may issue a warrant, directed to the sheriff of any county commanding him to levy upon and sell the real and personal property of any person liable for the tax, which may be found within his county, for the payment of the amount thereof, with any penalties and interest, and the cost of executing the warrant, and to return such warrant to the tax commission and to pay it the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the county clerk a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax, penalties and interest for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant is issued. The sheriff shall then proceed upon the warrant, in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner. In the discretion of the tax commission a warrant of like terms, force and effect may be issued and directed to any officer or

employee of the department of taxation and finance, and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the tax commission may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the state had recovered judgment therefor and execution thereon had been returned unsatisfied.

New York CPLR—Sect. 5202
(McKinney 1978)

§ 5202. Judgment creditor's rights in personal property

(a) Execution creditor's rights. Where a judgment creditor has delivered an execution to a sheriff, the judgment creditor's rights in a debt owed to the judgment debtor or in an interest of the judgment debtor in personal property, against which debt or property the judgment may be enforced, are superior to the extent of the amount of the execution to the rights of any transferee of the debt or property, except:

1. a transferee who acquired the debt or property for fair consideration before it was levied upon; or

2. a transferee who acquired a debt or personal property not capable of delivery for fair consideration after it was levied upon without knowledge of the levy.

(b) Other judgment creditor's rights. Where a judgment creditor has secured an order for delivery of, payment of, or appointment of a receiver of, a debt owed to the judg-



ment debtor or an interest of the judgment debtor in personal property, the judgment creditor's rights in the debt or property are superior to the rights of any transferee of the debt or property, except a transferee who acquired the debt or property for fair consideration and without notice of such order.

New York CPLR—Sect. 5234
(McKinney 1978)

§ 5234. Distribution of proceeds of personal property; priorities

(a) Distribution of proceeds of personal property. After deduction for and payment of fees, expenses and any taxes levied upon sale, delivery, transfer or payment, the proceeds of personal property or debt acquired by a receiver or a sheriff or other officer authorized to enforce the judgment shall be distributed to the judgment creditor and any excess shall be paid over to the judgment debtor.

(b) Priority among execution creditors. Where two or more executions or orders of attachment are issued against the same judgment debtor and delivered to the same enforcement officer, they shall be satisfied out of the proceeds of personal property or debt levied upon by the officer in the order in which they were delivered. Where two or more executions or orders of attachment are issued against the same judgment debtor and delivered to different enforcement officers, and personal property or debt is levied upon within the jurisdiction of all of the officers, the proceeds shall be first applied in satisfaction of the execution or order of attachment delivered to the officer who levied, and thereafter shall be applied in satisfaction of the executions or orders of attachment delivered to those of the other

officers who, before the proceeds are distributed, make a demand upon the officer who levied, in the order of such demands. An execution or order of attachment returned by an officer before a levy or delivered to him after the proceeds of the levy have been distributed shall not be satisfied out of those proceeds.

(c) Priority of other judgment creditors. Where personal property or debt has been ordered delivered, transferred or paid, or a receiver thereof has been appointed by order, or a receivership has been extended thereto by order, and the order is filed before the property or debt is levied upon, the rights of the judgment creditor who secured the order are superior to those of the judgment creditor entitled to the proceeds of the levy. Where two or more such orders affecting the same interest in personal property or debt are filed, the proceeds of the property or debt shall be applied in the order of filing. Where delivery, transfer, or payment to the judgment creditor, a receiver, or a sheriff or other officer is not completed within sixty days after an order is filed, the judgment creditor who secured the order is divested of priority, unless otherwise specified in the order or in an extension order filed within the sixty days.

Rules of Decision Act, 28 U.S.C. Section 1652 (1948)

§ 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944.

Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-588

In the Matter of UNITED CASKET CO., INC.,
*Bankrupt.*

YORK-HOOVER CORP. and ELGIN METAL CASKET CO., INC.,
*Petitioners,*

*against*

UNITED CASKET CO., INC.,
*Respondent,*

*and*

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENT DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-588

In the Matter of UNITED CASKET CO., INC.,

*Bankrupt.*

YORK-HOOVER CORP. and ELGIN METAL CASKET CO., INC.,

*Petitioners,*

*against*

UNITED CASKET CO., INC.,

*Respondent,*

*and*

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENT DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK

### Question Presented

1. Was the United States Court of Appeals for the Second Circuit correct in affirming the lower Courts' determinations that under Section 1141(b) of the New York Tax

Law, the State is granted a perfected lien upon the filing of its tax warrant without the further necessity of a levy.

## Statement of the Case

The facts in dispute can be concisely stated as follows. The New York State Tax Commission docketed three (3) sales tax warrants against United Casket Co., Inc. (United), the State's tax debtor, on April 8, 1976.

Rather than levy upon the assets of United and thereby foreclose the possibility of its continuing in business, the State Tax Commission agreed to allow United to gradually reduce its indebtedness by means of installment payments to be made on a weekly basis. On April 9, 1976, the day following the docketing of its tax warrants, the State Tax Commission entered into a written stipulation with the taxpayer providing for payment of the then outstanding tax liability of $86,653.23 at the weekly rate of $2,300. (I. 21)*

On May 12, 1976, York-Hoover Corp. and Elgin Metal Casket Co. Inc. (York-Elgin) filed a financing statement creating a security interest in United's inventory, accounts, contract rights and general intangibles then owned or thereafter acquired. At that time credit had been extended for $201,736.37. Subsequently, York-Elgin extended further credit increasing the indebtedness to $327,500 as of September 24, 1976. (I. 22-3)

Before extending credit to United, York-Elgin made a search of the County Clerk's office and arranged for the satisfaction of the sole security interest on record. Apparently, however, at no time was a search conducted of the appropriate clerk's office which would have disclosed the existence of the State's previously docketed

* Numerical references preceded by "I" refer to the Index on Appeal to the United States Court of Appeals.



tax warrants. Instead, York-Elgin relied on the written representation of United that there were no liens, encumbrances or security interests in and to any of its property or assets. (I. 17)

On September 24, 1976, United filed a petition for an arrangement under Chapter XI of the Bankruptcy Act but was subsequently adjudicated as bankrupt.

During the pendency of the Chapter XI proceeding York-Elgin commenced an adversary proceeding to vacate the automatic stay provisions of the Order entered in the proceeding and sought a declaratory judgment that the security interest of York-Elgin was superior to the tax liens of both the State and Federal Government. The Internal Revenue Service conceded on the record that its tax lien was subordinate to that asserted by the State.

The Bankruptcy Court, District Court and Second Circuit Court of Appeals have all concurred in the determination that Section 1141(b) of the New York Tax Law granted the State a perfected lien upon the filing of its tax warrant without the further necessity of a levy. Thus, the Courts ruled, the State's claim was to be accorded priority status over that asserted by York-Elgin on the basis of "first in time is first in right". . . . In Re *United States* v. *City of New Britain, Conn.*, 347 U.S. 81 (1954). (7a)*

The Courts were further in agreement that administration expenses and wage claims were to be paid out of the State Tax Commission's share of the distributed assets. As this aspect of the ruling has not been appealed, the sole issue before this Court is whether the lower courts have properly construed Section 1141(b) of the New York Tax Law.

* Numerical references followed by "a" refer to the Petitioner's appendix in this Court.

Both the Bankruptcy Court and District Court placed great reliance on the prior decision of the Second Circuit Court of Appeals in *Matter of Thriftway Auto Rental Corp.*, 457 F.2d 409 (2d Cir. 1972), which held that the New York City Tax Law set forth in its Administrative Code (with verbiage almost identical to Section 1141(b)), created a lien upon the Bankrupt's assets notwithstanding a failure to seize the bankrupt's property or otherwise enforce the lien.

In the instant case the Second Circuit Court of Appeals came to the same conclusion by relying upon a decision of the New York Court of Appeals in the case of *Marine Midland-Bank Central* v. *Gleason, et al.*, 47 N Y 2d 758 (1978), which authoritatively construed Section 1141(b) as granting the State a perfected lien upon the mere docketing of its tax warrants. (18a-22a) The New York Court of Appeals stated:

> We interpret this express language [§ 1141(b)] to grant the State a perfected lien upon the filing of a tax warrant without the further necessity of a levy. In so holding, we reject the conclusion reached by the Appellate Division that State tax liens, although perfected upon docketing, may be extinguished if a levy is not made within the lifetime of a judgment execution. (18a)

## REASON FOR DENYING CERTIORARI

**Where, as here, the sole issue presented involves the interpretation of State Law, which the Court below correctly construed in conformity with the analysis of the State's highest court, there is no issue which warrants review by this Court.**

It has been a long standing policy of this Court that it will steadfastly refrain from construing State law where the lower court's interpretation is reasonable and/or there



has been an authoritative analysis made by the State's own judiciary. *Bishop* v. *Wood*, 426 U.S. 66 (1975); *Gooding* v. *Wilson*, 405 U.S. 518 (1971); *United States* v. *Thirty Seven Photographs*, 402 U.S. 363 (1971), *reh. den.*, 403 U.S. 924; *Commissioner* v. *Estate of Bosch*, 387 U.S. 456 (1967); *Adderly* v. *Florida*, 385 U.S. 39 (1966); *Shuttlesworth* v. *Birmingham*, 382 U.S. 87 (1965); *General Box Co.* v. *United States*, 351 U.S. 159 (1956); *Dixon* v. *Duffy*, 344 U.S. 143 (1952); *Ragan* v. *Merchants Transfer Co.*, 337 U.S. 530 (1949); *Winters* v. *New York*, 333 U.S. 87 (1948).

In *Marine Midland-Bank Central* v. *Gleason*, the New York Court of Appeals consciously and purposefully took the opportunity to render a definitive statement regarding the proper construction to be given Section 1141(b) of the Tax Law.

The petitioner has failed to refer this Court to any New York cases, let alone decisions by that state's highest court, which come to a contrary conclusion with respect to the application of this or similar tax statutes. In fact, all of the authority cited by the petitioner relates to the treatment historically given ordinary creditors attempting to enforce their judgments under New York's Civil Practice Law and Rules, a totally distinct and inapplicable priority system. Practice Commentaries, McKinney's Cons. Laws of New York, §§ 5234, 5239.

It would also appear that the petitioner's research has not disclosed any conflicting interpretations given statutes similar to Section 1141(b) of the New York Tax Law, among any of the Circuit Courts of Appeal.

Finally, the petitioner has failed to allege any infirmity in Section 1141(b) of the Tax Law, as construed by the lower court, which would give rise to an issue of constitutional significance. At the very best, the petitioner suggests a purely hypothetical situation. Namely, it is urged that if the lower Court's ruling is allowed to stand, consumers would be burdened by time consuming record

searches, an extremely unlikely development, and one which would nevertheless be a matter of State Law.

In view of the inherent authority of the sovereign to establish a taxing system according certain priorities to governmental agencies, this argument is frivolous. See *Bob Jones Univ.* v. *Simon,* 416 U.S. 725 (1974); *International Harvester Co.* v. *Department of Taxation,* 322 U.S. 435 (1949).

## CONCLUSION

**For the foregoing reasons the petition for a writ of certiorari should be denied.**

Dated: New York, New York
October , 1979.

Respectfully submitted,

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*and*

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,
*Respondent.*

## REPLY BRIEF OF PETITIONERS YORK-HOOVER CORP. and ELGIN METAL CASKET CO., INC. FOR WRIT OF CERTIORARI

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DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

*Respondent.*

## REPLY BRIEF OF PETITIONERS

The respondents, New York State and the Trustee in Bankruptcy, refer to the inherent authority of the sovereign to establish a taxing system according certain priorities to governmental agencies, and seek to distinguish between the rights of the State and a non-sovereign judgment creditor.

The State established its own statute, § 1141(b) of the New York State Tax Law. In such statute, entitled "Proceedings to Recover Tax", the State provided for a lien against personal and real property and the manner of proceeding to collect the tax. The statute specifically provides

for the State tax warrant to be delivered to the sheriff, who is commanded to act in accordance with the statute "in the same manner and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record". The statute does not distinguish between a sovereign and a non-sovereign judgment creditor, but accords them the same rights, arising from the filing of the tax warrant by its recordation as a judgment. Accordingly, the warrant must be issued to be acted upon, and failure to proceed invalidates the lien.

As was pointed out in the original brief, a judgment was considered a lien against real property solely. *State Tax Commission* v. *Shor*, 43 N.Y. 2d 151.

In the instant case, the State received approximately $35,000 on account of its warrant from monies and merchandise totalling approximately $125,000 advanced by petitioners to enable the debtor to remain in business. The petitioners received nothing in repayment.

Even the Federal government gives notice of its lien by filing such notice among records relating to security interests (I, p. 28). The State notice was inadequate and the State seeks to put an undue burden on commerce to search judgment records for a period of twenty (20) years prior to each sale of merchandise.

By reason of the above and the reasons set forth in the petitioners' primary brief, the Court should grant certiorari.

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